Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FARMERS INSURANCE COMPANY, INC.,
Petitioner,
v.
JOSEPH JABBOUR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Supremacy Clause require that a state appellate court review a state trial court order denying confirmation of an award rendered pursuant to the Federal Arbitration Act ("FAA"), where the FAA expressly allows for immediate review of such an order?

2. Is an appraisal provision in an automobile insurance policy an agreement to arbitrate, within the meaning of the FAA, where underlying state law equates insurance appraisal with arbitration?

3. Is a state arbitration statute, which excludes insurance contracts from its reach, a law regulating the "business of insurance" within the meaning of the McCarran-Ferguson Act, so as to preclude the FAA's applicability to an appraisal clause in an insurance policy?

LIST OF PARTIES

All parties in the underlying state court action appear in the caption of this case. Farmers Insurance Company, Inc., has no subsidiaries. Farmers Insurance Company, Inc., is owned by Farmers Insurance Exchange.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner, Farmers Insurance Company, Inc., ("Farmers"), respectfully requests that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of Oklahoma entered on January 10, 1995, which dismissed an appeal filed by Farmers seeking review of the trial court's refusal to confirm an arbitration award rendered pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 2, 3, 9, 16.

I. OPINIONS BELOW

The order of the United States District Court for the Northern District Of Oklahoma, entered on June 5, 1991, remanding the action to the District Court Of Tulsa County, is reprinted in the appendix hereto, p. 1.

The order of the District Court of Tulsa County, Oklahoma, granting Farmers' Motion To Require Appraisal and Motion To Stay, entered on August 19, 1992, is reprinted in the appendix, p. 4.

The order of the District Court of Tulsa County, Oklahoma, denying Farmers' Motion For Order Confirming Appraisal Award, entered on August 17, 1994, is reprinted in the appendix, p. 6.

The order of the District Court of Tulsa County, Oklahoma, denying Farmers' Motion To Reconsider Order Denying Motion To Confirm Award, entered in September 28, 1994, is reprinted in the appendix, p. 8.

The Oklahoma Supreme Court's order requiring Farmers to show cause why the appeal should not be dismissed, entered on

November 30, 1994, is reprinted in the appendix, p. 10.

The Oklahoma Supreme Court's order, entered on January 10, 1995, dismissing Farmers' appeal and refusing to assume original jurisdiction, is reprinted in the appendix, p. 12.

II. JURISDICTION

On January 10, 1995, the Oklahoma Supreme Court issued an order dismissing Farmers' appeal and refusing to assume original jurisdiction. In so ruling, the Oklahoma Supreme Court rejected Farmers' argument that 9 U.S.C. § 16 (West Supp. 1995) required the Court to review the trial court's order denying confirmation of the an arbitration award.

Farmers did not file a petition for rehearing. The statutory provision conferring jurisdiction on this Court to review the opinion of the Oklahoma Supreme Court is 28 U.S.C. § 1257(a)(1993).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States constitutional provision involved is the Supremacy Clause, art. VI, cl. 2, of the United States Constitution. The federal statutes involved are 15 U.S.C., § 1012 (1976) and 9 U S.C. §§ 2, 3, 9, 10 and 16 (1970 & West Supp. 1995). The Oklahoma constitutional and statutory provisions involved are Okla. Stat. tit. 12, §§ 952, 953, 993 (1988 & West Supp. 1995); Okla. Stat. tit. 12, §§ 1451, 1452 (1993); and Okla. Const. art. 7, §§ 4, 7 and Okla. Stat. tit. 15, § 802(A) (1993). Because the constitutional provisions and statutes are lengthy, they are set forth in the appendix, at pp. 13-29.

IV. STATEMENT OF CASE

Respondent Joseph Jabbour ("Jabbour") owned a 1984 Porsche. The Porsche was involved in a collision. Jabbour had the Porsche towed to a repair shop where unknown thieves stole the Porsche's stereo system.

Farmers issued an automobile insurance policy to Jabbour containing comprehensive and collision coverage on the Porsche. Jabbour made claims under both coverages. Jabbour and Farmers ultimately failed to settle the claim. Jabbour filed an action against

Farmers in Tulsa County District Court on September 7, 1989 alleging two causes of action.

In the first, Jabbour stated that the Porsche was damaged in a collision and that Farmers had issued an insurance policy to Jabbour which covered the Porsche. Jabbour then alleged that Farmers breached the terms of the insurance policy by failing to pay benefits under the collision coverage.

In the second cause of action, Jabbour alleged that Farmers breached the terms of the insurance policy by failing to pay benefits under the comprehensive coverage for the theft of a stereo system. Jabbour sought $10,390.79 as the reasonable value of the stolen stereo system.

In response to Jabbour's Petition, Farmers filed an Answer which, among other things, demanded appraisal under the terms of the policy. Subsequently, Jabbour filed an Amended Petition asserting a bad-faith insurer cause of action against Farmers.

Farmers removed the case to the United States District Court for the Northern District of Oklahoma. Farmers filed in federal district court a Motion To Require Appraisal and Motion

To Stay Under Federal Arbitration Act. Farmers' policy contained the following appraisal provision:

> You or we may demand appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court having jurisdiction, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the amount payable, which shall be binding subject to the terms of the insurance.

On March 27, 1991, Jabbour filed a Motion For Remand, which also contained arguments opposing Farmers' appraisal request.

On June 12, 1991, the federal court remanded the action to Tulsa County District Court. In the Order remanding the action, the federal court specifically declared that it had "not considered" Farmers' Motion to Require Appraisal. (Order, p.1, appendix).

In state court, Farmers again sought to invoke the policy appraisal provisions. Farmers filed a Motion To Compel Appraisal and Motion To Stay based on Oklahoma common law and the FAA.

In his response to Farmers' motion, Jabbour, inter alia, argued that appraisal was not available under Oklahoma common law. As to the FAA, Jabbour contended the policy appraisal provision was not an "arbitration" agreement as contemplated by 9 U.S.C. § 2. Jabbour also argued that the McCarran-Ferguson Act prevented application of the FAA to the appraisal provision. The trial court rejected Jabbour's arguments, stayed the state court action, and granted Farmers' Motion To Compel Appraisal. (Order, p.4, appendix).

Jabbour and Farmers then entered into a Memorandum For Appraisal. In the Memorandum, the parties agreed that the appraisers would determine the actual cash value of, and the amount of loss to Jabbour's Porsche. On January 10, 1994, two appraisers and an umpire awarded Jabbour $18,000. Farmers paid Jabbour the full amount of the award. Jabbour never sought to vacate or modify the award.

On July 22, 1994, Farmers filed a motion to confirm the appraisal award. Farmers sought confirmation under the FAA and Oklahoma common law. Jabbour objected to confirmation. In his

objection, Jabbour asserted similar arguments that he had previously raised in response to Farmers' Motion To Compel Appraisal. Jabbour did not allege the award was procured by corruption, fraud, undue means, or misconduct of the appraisers or umpire. Jabbour did not allege the award was inadequate. Despite its earlier order compelling appraisal, the trial court refused to confirm the award. (Order, p. 6, appendix) The trial court stated no reason for its ruling. Farmers timely filed a motion to reconsider. The trial court again refused to confirm the appraisal award. (Order, p. 8, appendix).

Farmers then timely filed a Petition In Error with the Oklahoma Supreme Court to review the trial court's refusal to confirm the appraisal award. In its Petition in Error, Farmers alleged the trial court committed error under Oklahoma common law and the FAA in arbitrarily refusing to confirm the award. As to the FAA, Farmers asserted that 9 U.S.C. § 16(a)(1)(D) provided the Oklahoma Supreme Court with authority to review the trial court's interlocutory order. (Petition in Error, p. 30, appendix).

On November 30, 1994, the Oklahoma Supreme Court ordered Farmers to show cause why the appeal should not be dismissed. Specifically, the Court ordered as follows:

> Court notes the filing of a supplemental petition in error with the orders attached. Appellant is directed to show cause why this appeal should not be dismissed for lack of an appealable order. In response, appellant should address the following: 1) why the Federal Arbitration Act should apply when the Oklahoma Arbitration Act expressly exempts insurance contracts from its provisions, 15 O.S. 1991 § 802(A); 2) whether the Federal Arbitration Act applies in this case, see Hartford Lloyd's Insurance Company v. Teachworth, 898 F.2d 1058 (5th Cir. 1990); and 3) if the Oklahoma and Federal Arbitration Acts don't apply, any other reason why the trial court's order would be appealable. Appellant's response shall be filed not later than December 14, 1994.

(Order, p. 10, appendix).

On December 14, 1994, Farmers filed its Brief To Show Cause Why Appeal Should Not Be Dismissed. In the brief, Farmers made three arguments. First, Farmers contended that the policy appraisal provision was valid and enforceable under the FAA as an "arbitration" agreement. Second, Farmers argued that the Oklahoma Arbitration Act did not prevent application of the FAA. The Oklahoma Arbitration Act, Farmers contended, did

not purport to regulate the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012, et.seq.

Third, Farmers argued that the 9 U.S.C. § 16(a)(1)(D) required the Oklahoma Supreme Court to review the trial court's order. Farmers conceded that, in the absence of 9 U.S.C. § 16(a)(1)(D), the trial court's order was an unappealable interlocutory order under Oklahoma appellate statutes and rules. Nevertheless, Farmers argued that its rights under the FAA would essentially be forfeited if immediate review were denied. Farmers then cited a split in state court authority as to whether the appeal rules in 9 U.S.C. § 16 were applicable in state court actions involving the FAA.

Farmers asked the Oklahoma Supreme Court to recast Farmers' Petition In Error as Petition For Writ of Mandamus and assume original jurisdiction over the matter if it determined the trial court's order was unappealable. Farmers argued that the Oklahoma Supreme Court had, on several occasions, recast petitions in error as applications to assume original jurisdiction.

Farmers cited an Oklahoma case where, by analogy, the Oklahoma Supreme Court held that mandamus was appropriate to compel a trial court to confirm a foreclosure sale. Farmers also cited a Texas Supreme Court decision where the court held that an original action was appropriate for reviewing an otherwise unappealable, anti-arbitration order under the FAA.

On January 11, 1995, the Oklahoma Supreme Court dismissed Farmers' appeal. The Court issued the following order:

> Appellee's motion to dismiss is granted and this appeal is dismissed. The trial court's order, refusing to confirm an appraisal award in a case arising out of an insurance contract, is not an interlocutory prejudgment order appealable by right. Insurance contracts are specifically excluded from the Oklahoma Arbitration Act. See 15 O.S. 1991 § 802(A). Interlocutory orders appealable by right are limited to those expressly identified by an Oklahoma statute. Reams v. Tulsa Cable Television, Inc., 604 P.2d 373 (Okla. 1979).
>
> Appellant's request that the petition in error be recast as an application to assume original jurisdiction and petition for writ of mandamus is denied.

(Order, p. 12, appendix).

Farmers seeks certiorari to review the Oklahoma Supreme

Court's refusal to provide immediate review of the trial court's order denying confirmation. As discussed below, the appraisal provision in Farmers' policy is valid and enforceable under the FAA. The FAA provides for an immediate appeal from an order refusing to confirm an award. 9 U.S.C. § 16(a)(1)(D). State courts are split as to whether an immediate right of appeal to state court lies from the interlocutory orders in 9 U.S.C. § 16(a). By denying any review of the trial court's order, the Oklahoma Supreme Court is refusing to recognize the FAA, denying Farmers' rights under the FAA, and perpetuating judicial hostility toward arbitration.

V. REASONS FOR GRANTING THE WRIT

A. THE SUPREMACY CLAUSE REQUIRES THE OKLAHOMA SUPREME COURT TO REVIEW THE TRIAL COURT'S ORDER

The Oklahoma Supreme Court should have reviewed the trial court's order denying confirmation of the appraisal award. As it now stands, Farmers must suffer an adverse final judgment as a pre-condition to state appellate court review of its FAA rights.

Without immediate review, the core purpose of the FAA--to enforce arbitration agreements--will have been frustrated. The Oklahoma Supreme Court has, without valid excuse, ignored the express appeal rules of the FAA. The Supremacy Clause prohibits Oklahoma from refusing to enforce federal rights emanating from the FAA.

1. The FAA pre-empts conflicting state substantive and procedural law.

The FAA is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Hosp. v Mercury Const. Corp., 460 U.S. 1, 24 (1983). "Congress' clear intent, in the [Federal] Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." Id. at 22.

This Court has declared: "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration,

sought to eliminate." Southland Corp. v. Keating, 465 U.S. 1,7 (1984). "[T]he unmistakenly clear congressional purpose [was] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1962).

The FAA is enforceable in federal and state courts. Southland, 465 U.S. at 16. The FAA pre-empts state statutes to the contrary and makes more restrictive state statutes invalid under the Supremacy Clause. Id. at 15-16.

Although the federal policy does not require arbitration under a certain set of procedural rules, state law may be pre-empted if it conflicts with federal law and is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Volt Information Sciences, Inc. v. Board Of Trustees, 489 U.S. 468, 477 (1989)(quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

2. State courts should recognize the procedural rules of Section 16 of the FAA.

This Court has not yet decided whether the procedural rules of the FAA are applicable in state court proceedings. Volt 489 U.S. at 477 n.6. Nevertheless, several state courts have held that various procedural sections of the FAA are enforceable in state court proceedings. For instance, state courts have applied the stay provisions of section 3 in state court proceedings. Cone, 460 U.S. at 27, n. 34.

Similarly, state courts have recognized that section 9, which requires judicial confirmation of awards, applies in state court proceedings. See, Hilton Constr. Co. v. Martin Mechanical Contractors, Inc., 251 Ga. 701, 703, 308 S.E.2d 830, 832 (1983); Tampa Motel Mgmt.Co. v. Stratton of Florida, Inc., 186 Ga.App. 135, 138-39, 366 S.E.2d 804, 807 (1988); Trident Tech. College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 103-04, 333 S.E.2d 781, 785 (1985), cert. denied, 474 U.S. 1060 (1986); But see, Atlantic Painting & Contracting, Inc. v. Hashville Bridge Co., 670 S.W.2d 841, 846 (Ky. 1984).

This Court has not considered whether section 16, which relates to interlocutory appeals, applies in state court proceedings.

However, state courts addressing the issue are split. See, e.g., A.G. Edwards & Sons, Inc. v. Clark, 558 So.2d 358 (Ala. 1990)(section 16 of the FAA gives a right to appeal interlocutory orders otherwise unappealable under state law); Jack A. Anglin Co. Inc. v. Tipps,, 842 S.W.2d 266 (Tex. 1992)(section 16 is not applicable in state court, however, to preserve rights under FAA, petition for writ of mandamus is proper procedure for challenging trial court's anti-arbitration ruling under FAA). As applied to our case, Section 16(a)(1)(D) of the FAA expressly allows for immediate appeal from a trial court's refusal to confirm an award.

Farmers contends that state courts must recognize section 16(a). As discussed below, without immediate review of the various anti-arbitration orders listed in section 16(a), the federal pro-arbitration policy of section 2 would be wholly frustrated.

Section 16 reflects an "express congressional judgment that particular policies require that private rights be vindicable immediately...." Digital Equipment Corp. v. Desktop Direct, Inc., ___U.S.___, 114 S.Ct. 1992, 2002, n. 7 (1994). This congressional judgment, pursuant to the Supremacy Clause, is the

prevailing policy and law in Oklahoma. Testa v. Katt, 330 U.S. 386 (1947)(the policy of a federal law is the "prevailing policy of every state."); Howlett By And Through Howlett v. Rose, 496 U.S. 356 (1990). Oklahoma courts are not free to reject this congressional policy and resulting federal law. Testa, 330 U.S. at 814; Howlett, 330 U.S. at 368-374. Indeed, the Oklahoma Supreme Court cannot use its procedural rules to deny, burden or otherwise frustrate a federal right. "A federal right cannot be defeated by forms of local practice." Brown v. Western R. Co. of Alabama, 388 U.S. 294 (1949); Felder v. Casey, 487 U.S. 130 (1988); Howlett, 496 U.S. at 372.

By refusing immediate review of an order made appealable under the FAA, the Oklahoma Supreme Court has impermissibly rejected congressional policy and refused to enforce a federal right. Indeed, denying immediate review of the trial court's order forces Farmers to suffer an adverse judgment in a traditional judicial forum as a pre-condition to state appellate court review of an anti-arbitration order under the FAA. Massey v. Farmers Ins. Group, 837 P.2d 880, 883 (Okla. 1992)(only a confirmed award has the

same preclusive effect as a judgment in a civil action). In essence, the Oklahoma Supreme Court has told Farmers that its appraisal provision will not be enforced until the state-court litigation has fully run its course. This violates the FAA. Southland, 465 U.S. at 8-9 ("For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate.").

Moreover, Farmers is not asking this Court to require the State of Oklahoma to create a court competent to enforce appellate rights under the FAA. Review of the trial court's refusal to confirm the award is possible under existing Oklahoma procedural rules.

Pursuant to Article 7, § 4 of the Oklahoma Constitution, the Oklahoma Supreme Court is vested with the appellate jurisdiction and original jurisdiction over all inferior courts. The trial court's order is not appealable as of right under Oklahoma statutes. Okla. Stat. tit. 12, §§ 952, 953, 993. Nevertheless, the original jurisdiction of the Oklahoma Supreme Court is broad

enough to include review of the trial court's order refusing to confirm the appraisal award. Okla. Const. art. 7, § 4; Okla. Stat. tit. 12, §§ 1451, 1452; State v. District Court Of Custer Co., 185 Okla. 597, 95 P.2d 851 (1939)(mandamus will lie to compel a trial court to confirm a foreclosure sale); McLin v. Trimble, 795 P.2d 1035 (Okla. 1990)(although appeal unavailable under Oklahoma statutes, writ of prohibition proper method for review of interlocutory order denying correctional officer's claim of qualified immunity under 42 U.S.C. § 1983).

In the present case, the Oklahoma Supreme Court refused to assume original jurisdiction and review the trial court's order without a "valid excuse." Howlett, 496 U.S. at 369 ("A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'")(quoting Douglas v. New York, N.H.& H.R. Co., 279 U.S. 377, 387-388 (1929)). Indeed, the Court gave absolutely no excuse at all.

Nevertheless, two possible rationales exist which might explain the Court's refusal to review the trial court's order. Neither is valid under the Supremacy Clause. Howlett, 496 U.S.

at 371 ("An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law...")

First, the Oklahoma Supreme Court might have determined that undesirable piecemeal litigation would result if review of interlocutory orders under the FAA were permitted. However, this excuse fails under the Supremacy Clause. A state court cannot refuse to enforce federal law simply because it disagrees with the wisdom of congressional judgment or policy. Testa, 330 U.S. at 393. The congressional judgment or policy, as expressed in section 16 of the FAA, is that the need for immediate review of various interlocutory, anti-arbitration orders far outweighs the potential negative side-effects of piecemeal litigation. Digital, ____U.S._____, 262 S.Ct. at 2002, n.7.

Second, the Oklahoma Supreme Court, in refusing to review the trial court's order, might have been intending to perpetuate judicial hostility toward arbitration. This excuse for denying review of course violates the FAA. This hostility to arbitration, however, can be inferred by actions of the Oklahoma

Supreme Court in accepting original jurisdiction in a similar case involving federal rights where appellate review was also unavailable under Oklahoma statutes.

In McLin, the Oklahoma Supreme Court acknowledged the national federal policy of providing immediate review of interlocutory orders denying qualified immunity to officials in 42 U.S.C. § 1983 actions. The Court noted that it did not have appellate jurisdiction of the trial court's order overruling a motion for summary judgment as to qualified immunity. The Court rejected the argument that the Supremacy Clause actually empowered or gave the Court appellate jurisdiction to hear the appeal. Nevertheless, due to the important federal substantive interests at stake, the Court accepted the matter within its original jurisdictional.

No real distinction exists between McLin and our case. The only explanation for the Court's refusal of original jurisdiction in our case (and its acceptance in McLin) lies in the Court's apparent hostility toward arbitration--the very evil the FAA was designed to prevent.

3. A uniform procedural rule is needed as to the timing of appeals under the FAA.

This Court should issue a writ of certiorari to make it clear that the orders specified in section 16(a) of the FAA are immediately reviewable in state court proceedings. Such a ruling would have widespread application since the overwhelming majority of claims involving the FAA arise in state court. Southland, 465 U.S. at 13.

Moreover, the substantive provisions of the FAA are practically meaningless without the appeal rules in Section 16. To allow state courts to refuse immediate review of anti-arbitration orders frustrates the purpose and intent of the FAA and essentially nullifies the FAA as an alternate dispute mechanism. Without immediate review, parties such as Farmers are forced to fully litigate issues covered by an arbitration agreement as a pre-condition to review of anti-arbitration orders.

Finally, a uniform rule as to the timing of appeals under the FAA will help reduce unequal enforcement of arbitration agreements in state and federal court. With a uniform rule, state

court litigants, like Farmers, would be entitled to the same important review rights as federal court litigants. Without a uniform appeal rule, state court litigants, like Farmers, must first fully litigate a claim before seeking review and enforcement of their FAA rights. Similarly situated federal court litigants, however, can obtain immediate review and enforcement of their arbitration agreements before having to fully litigate the underlying claims. This type of discrimination wholly violates the congressional intent of the FAA. Southland, 464 U.S. at 15 ("We are unwilling to attribute to Congress the intent....to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted.")

4. The appraisal provision is enforceable under the FAA.

When initially presented with Farmers' appeal, the Oklahoma Supreme Court expressed concern as to whether the FAA applied to the insurance policy appraisal provision at issue in this case. The Court also questioned the effect of the Oklahoma Arbitration Act on the appraisal provision. Farmers presents the

following brief argument to show this Court that Farmers has a valid complaint as to the trial court's refusal to confirm the appraisal award.

9 U.S.C. § 2 validates "contracts..to settle by arbitration a controversy thereafter arising out of such contract." The FAA does not define "arbitration." Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987). Thus, in determining whether parties have entered into an agreement to arbitrate under the FAA, courts are to apply state law principles. Wasyl, 813 F.2d at 1582; Recold, S.A. de C.V.V. Monfort of Colorado, Inc., 893 F.2d 195, 197, n. 6 (8th Cir. 1990); Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058, 1062 (5th Cir. 1990).

Oklahoma courts have broadly defined "arbitration" as "the submission of some disputed matter to selected persons, and the substitution of their decision or award for the judgment of the established tribunals of justice." Deal v Thompson, 51 Okla. 256, 258-59, 151 P. 856 (1915). Oklahoma courts have equated insurance appraisal clauses with arbitration. Mercantile Ins. Co. v Murray, 171 Okla. 597, 43 P.2d 451 (1935)(court repeatedly

refers to appraisal clause in insurance agreement as an arbitration clause and simply treats the two as the same); Hartford Fire Ins. Co. v Sullivan, 74 Okla. 241, 179 P. 24 (1919)(appraisal in insurance policy referred to as "arbitration").

More recently, the Oklahoma Supreme Court has held that insurance "appraisal" differs from "arbitration" only if the appraisal clause in the policy is required by statute. Massey, 837 P.2d at 884, n. 1.

Since the appraisal clause in Jabbour's policy would refer the dispute, by voluntary agreement of the parties, to three impartial arbitrators for a final and binding decision as to the amount of the loss, there is no doubt that this would qualify as "arbitration" under the Massey case. Unlike the appraisal provision in Massey, however, the Jabbour appraisal provision was not inserted because of a statutory mandate. It was inserted simply as a normal clause in the contract. See, also, Intracoastal Ventures Corp. v Safeco Ins. Co. of American, 540 So. 2d 162 (Fla. App. 4th 1989) (appraisal clause similar to appraisal clause in Jabbour's policy held to be an "arbitration agreement"); Waysl, (Ninth

Circuit, applying California law, determined that appraisal clause in purchase contract was "arbitration agreement" within the meaning of the FAA).

In sum, the appraisal clause in Jabbour's policy is enforceable under the FAA. A determination that the appraisal clause is an "arbitration agreement" under the FAA would promote the strong federal policy in favor of arbitration. As a matter of federal law, any doubts regarding Jabbour's appraisal clause should be resolved in favor of arbitration.

Furthermore, the Oklahoma Arbitration Act, Okla. Stat. tit 15, § 801, et. seq., does not prevent application of the FAA to the appraisal provision. The Oklahoma Arbitration Act does not purport to regulate the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. §1012, et. seq. The McCarran-Ferguson Act makes the regulation of the "business of insurance" strictly a matter for state law. Thus, if Oklahoma has sought to prohibit insurance appraisal by statute in Oklahoma, then the McCarran-Ferguson Act would honor the Oklahoma statute and the FAA would not apply. However, Oklahoma has not sought to

prohibit insurance appraisal/arbitration by statute.

First, no provision in Oklahoma's insurance code would be impaired, invalidated or superseded by application of the FAA. A state regulatory scheme which covers "insurance" in general, without specifically prohibiting arbitration, is not sufficient to exempt an insurance arbitration agreement from operation of the FAA. Miller v Nat. Fid. Life Ins. Co., 588 F. 2d 185, 187 (1979) ("The test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by application of federal law."); Hart v Orion Ins. Co. 453 F.2d 1358 (10th Cir. 1971) (party seeking to use McCarran Act failed to show application of FAA would impair, impede, or invalidate any particular state law which regulated the business of insurance).

Moreover, in Massey v. Farmers Ins. Group, the Oklahoma Supreme Court held that an appraisal clause in a fire insurance policy was invalid under the Oklahoma constitution because the clause amounted to a legislatively required loss of the

right to jury trial. The Massey Court, however, only disapproved of insurance appraisal clauses if they were mandated by statute. Obviously then, Oklahoma does not "regulate" insurance appraisal. In fact, Oklahoma courts only approve of insurance appraisal clauses if they are inserted without statutory requirement. Under Massey, the only "good" appraisal under the Oklahoma Constitution would be an "**unregulated**" appraisal (i.e., an appraisal clause that was not mandated by statute such as exists in the present case).

Second, section 802 of the Oklahoma Arbitration Act is not an attempt by the Oklahoma legislature to regulate insurance appraisal. As discussed below, the practice of "arbitration/appraisal" is not the in the "business of insurance" within the meaning of the McCarran-Ferguson Act. Furthermore, even if arbitration is the "business of insurance," the FAA does not invalidate, impair or supersede section 802.

In order for the McCarran-Ferguson Act to apply, three elements must be present: "(1) a state statute intended to regulate or tax, (2) the "business of insurance" (3) which is invalidated,

impaired, or superseded by an Act of Congress not expressly related to the business of insurance." Gordon v. U.S. Dept. of Treasury, 668 F. Supp. 483, 487 (D.Md. 1987), aff'd. 846 F.2d 272, cert.den., 107 S.Ct. 1549. With respect to the second element, the "business of insurance" is not the same as the "business of insurance companies." Group Life & Health Ins. v Royal Drug Co., 440 U.S. 205, 211 (1970). Federal courts have determined that state arbitration acts are not laws regulating the "business of insurance" within the meaning of the McCarran-Ferguson Act. Hamilton Life Ins. Co. of N.Y. v Republic Nat. Life Ins. Co., 408 F.2d 606 (2nd Cir. 1969)(Texas Arbitration Act and New York Arbitration Act were not laws that regulated the "business of insurance"); Triton Lines, Inc., v Steamship Mut. Underwriting Assoc., 707 F. Supp. 277, 279 (S.D. Tex. 1989) ("A disputed claim is not the business of insurance. The business of regulating the insurance industry focuses on the underwriting and spreading of the policyholder's risk...The McCarran Act has never been held to have abrogated federal procedural practices in federal court cases. The anti-arbitration provision of the Texas

Insurance Code, therefore, is countermanded by the Federal Arbitration Act."); Contra, Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., 969 F.2d 931 (10th Cir. 1992), cert. den. 113 S.Ct. 604.

Nevertheless, even if Okla. Stat. tit. 15, § 802 is a law regulating the "business of insurance", the FAA does not invalidate, impair or supersede that section. Section 802 does not declare insurance arbitration invalid. Section 802 does not specifically invalidate or make illegal arbitration agreements in insurance policies. Rather than invalidating insurance arbitration agreements. section 802 simply excludes insurance contracts from the reach and procedural guidelines of the Oklahoma Arbitration Act. Section 802(A), in relevant part, states: "This act shall not apply to....contracts with reference to insurance except for those between insurance companies." Cf. Great Plains, (FAA impaired Kansas arbitration act which states that arbitration agreements in insurance contracts are invalid). In short, the legislature has not attempted to regulate insurance in the Oklahoma Arbitration Act. The most that can be said is that the legislature consciously chose

not to regulate insurance arbitration.

Since they are not controlled by statute, insurance appraisal agreements fall within Oklahoma common law which, according to Massey, has always allowed for appraisal provisions in insurance policies. Notably, even if insurance arbitration/ appraisal is held invalid at common law, the FAA overrules the common law and makes them valid through the Supremacy Clause. And, state common law rules purporting to make arbitration clauses generally unenforceable are not laws regulating the "business of insurance" within the meaning of the McCarran-Ferguson Act. Ainsworth v. Allstate Ins. Co., 634 F. Supp. 52 (W.D.Mo. 1985).

V. CONCLUSION

For all the reasons stated, Farmers' petition for a writ of certiorari should be granted.

Respectfully submitted,

KNOWLES, KING, TAYLOR & ELLIS

By _____

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Farmers Insurance Company, Inc.

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FARMERS INSURANCE COMPANY, INC.,
Petitioner,
v.
JOSEPH JABBOUR,
Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Portions of Petition in Error
Filed in The Supreme Court of
The State of Oklahoma, October 27, 1994 30

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

JOSEPH JABBOUR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 91-C-116-E
	)	
FARMERS INSURANCE COMPANY, INC., d/b/a FARMERS INSURANCE GROUP,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Defendant's Motion to Require Appraisal/Motion to Stay Under Federal Arbitration Act and Plaintiff's Motion to Remand. Because the Court finds that Plaintiff's Motion is dispositive, it need not consider Defendant's motion.

It is undisputed that Plaintiff filed suit in state court on September 7, 1989 asserting two causes for breach of the terms of the insurance policy, that on February 1, 1991 Plaintiff amended his petition to add a claim for bad faith breach of the policy arising out of six specific acts identified by Plaintiff, and that

Defendant filed its Notice of Removal in this Court on February 25, 1991. Plaintiff urges this Court to remand the case to state court because Defendant's attempted removal is out of time. The pertinent section of the federal removal provision, 28 U.S.C. §1446(b) states that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action." The basis of jurisdiction asserted by Defendant in its Notice of Removal is diversity pursuant to 28 U.S.C. §1446. Therefore, Plaintiff argues, the one year cap applied and remand is appropriate.

In response, Defendant argues that this Court should apply the exception to the thirty-day rule of §1446 which has been carved out by case law. This case law exception permits removal after the expiration of the thirty-day period where Plaintiff's amended complaint "so changes the nature of his action as to constitute 'substantially a new suit begun that day.'" Wilson v. Intercollegiate (Big Ten) Conf., 668 F.2d 962, 965 (7th Cir. 1982), quoting Fletcher v. Hamlet, 116 U.S. 408, 410, 6 S.Ct. 426, 29 L.Ed. 679 (1886). Assuming, arguendo, that this case law

exception should apply to the one-year cap as well, the Court finds that Plaintiff's additional cause of action for bad faith breach does not transform his breach of policy case into a new suit. The Court further finds that the interests of judicial economy and prevention of interference in the state court action where substantial proceedings have occurred, interests which underpin the one-year cap, are of paramount importance in the instant case. Therefore, this Court finds that this case should be remanded to Tulsa County District Court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand is hereby granted.

ORDERED this 5th day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

STATE OF OKLAHOMA
DISTRICT COURT IN AND FOR TULSA COUNTY,
OKLAHOMA

ORDER

On this 19th day of August, 1992, the following matters in the designated cases came on for decisions, pursuant to the Rules of the District Court for Tulsa County. The Clerk of the Court is directed to notify counsel of record of the indicated decisions by mailing a copy of the ORDER to them and filing a copy of the ORDER in each case.

_____
DAVID L. PETERSON
DISTRICT JUDGE

CJ-89-4868 JOSEPH JABBOUR V FARMERS INSURANCE CO.

Defendant's motion to compel an appraisal and stay is granted. Notice mailed to: Bruce McKenna, Dale Ellis.

AFFIDAVIT OF MAILING

I hereby certify that I have this 19th day of Aug., 1992 mailed

a true and correct copy of the above decision(s) as ordered by the Court, and a true and correct copy was filed in each of the above foregoing cases.

DON E. AUSTIN, COURT CLERK

_____

Marianne Moffett
Deputy Court Clerk

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

JOSEPH JABBOUR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 89-4868
	)	
FARMERS INSURANCE COMPANY, INC., d/b/a FARMERS INSURANCE GROUP,	)	
	)	
Defendant.	)	

ORDER

On this 17th day of August, 1994, the Motion for Order Confirming Appraisal Award of defendant Farmers Insurance Company, Inc., comes before this Court. This Court finds that said Motion should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant's Motion for Order Confirming Appraisal Award is hereby denied.

David Peterson
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

_____

FRANK CASEY,
Attorney for Plaintiff

_____

DALE ELLIS
Attorney for Defendant

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

JOSEPH JABBOUR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CJ-89-4868
	)	
FARMERS INSURANCE COMPANY, INC., d/b/a FARMERS INSURANCE GROUP,	)	
	)	
Defendant.	)	

ORDER

On this 28th day of September, 1994, the Motion to Reconsider Order Denying Motion to Confirm Award and Request for Hearing of defendant Farmers Insurance Company Inc., filed on August 18, 1994, comes on before this Court. The Court finds that said motion and request should be denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defendant's Motion to Reconsider Order Denying Motion to Confirm Award and Request for Hearing are hereby denied.

DAVID PETERSON
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM

_____

FRANK CASEY,
Attorney for Plaintiff

_____

DALE ELLIS
Attorney for Defendant

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

November 30, 1994

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDER:

84,516 - FARMERS INSURANCE COMPANY, INC. V. JOSEPH JABBOUR

Court notes the filing of a supplemental petition in error with the orders attached. Appellant is directed to show cause why this appeal should not be dismissed for lack of an appealable order. In response, appellant should address the following: 1) why the Federal Arbitration Act should apply when the Oklahoma Arbitration Act expressly exempts insurance contracts from its provisions, 15 O.S. 1991 § 802(A); 2) whether the Federal Arbitration Act applies in this case, see Hartford Lloyd's Insurance Company v. Teachworth, 88898 F.2d 1058 (5th Cir. 1990); and 3) if the Oklahoma and Federal Arbitration Acts don't apply, any other reason why the trial court's order would be appealable. Appellant's response shall be filed not later than December 14, 1994.

Robert E. Lavender
VICE CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FARMERS INSURANCE COMPANY, INC.,	)	
Appellant,	)	
v.	)	No. 84-516
JOSEPH JABBOUR,	)	
Appellee.	)	

ORDER

Appellee's motion to dismiss is granted and this appeal is dismissed. The trial court's order, refusing to confirm an appraisal award in a case arising out of an insurance contract, is not an interlocutory prejudgment order appealable by right. Insurance contracts are specifically excluded from the Oklahoma Arbitration Act. See 15 O.S. 1991 § 802(A). Interlocutory orders appealable by right are limited to those expressly identified by an Oklahoma statute. Reams v. Tulsa Cable Television, Inc., 604 P.2d 373 (Okl. 1979).

Appellant's request that the original petition in error be recast

as an application to assume original jurisdiction and petition for writ of mandamus is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10TH DAY OF JANUARY, 1995.

Alma Wilson
CHIEF JUSTICE

WILSON, C.J., KAUGER, V.C.J., LAVENDER, SIMMS and OPALA, JJ. - Concur

U.S. Const., art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15 U.S.C. § 1012 (1976). Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation of taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act

of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.

9. U.S.C. § 2 (1970). Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or an contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contact or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

contract.

July 30, 1947, c.392, 61 Stat. 670.

9. U.S.C. § 3 (1970). Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 3392, 61 Stat. 670.

9. U.S.C. § 9 (1970). Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment

of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified of an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c.392, 61 Stat. 672.

9. U.S.C. § 10 (West Supp. 1995). Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration-

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of nay other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award

upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a hearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(As amended Nov. 15, 1990, Pub.L. 101-552, §5, 104 Stat. 2745; Aug. 26, 1992, Pub.L. 102-354, §5(b)(4), 106 Stat. 946.)

9.U.S.C. §16 (West Supp. 1995). Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1977, 102 Stat. 4671, §15 renumbered Pub.L. 101-650, Title III, §325(a)(1), Dec. 1, 1990, Stat. 5120.)

Okla. Stat. tit. 12, § 952 (1988). Jurisdiction of Supreme Court

(a) The Supreme Court may reverse, vacate or modify judgments of the district court for errors appearing on the record, and in the reversal of such judgment may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof.

(b) The Supreme Court may reverse, vacate or modify any of the following orders of the district court, or a judge thereof:

1. A final order;

2. An order that discharges, vacates or modifies or refuses

to vacate or modify a provisional remedy which affects the substantial rights of a party; or grants, refuses, vacates, modifies or refuses to vacate or modify an injunction; grants or refuses a new trial; or vacates or refuses to vacate a final judgment;

3. Any other order, which affects a substantial part of the merits of the controversy when the trial judge certifies that an immediate appeal may materially advance the ultimate termination of the litigation; provided, however, that the Supreme Court, in its discretion, may refuse to hear the appeal. If the Supreme Court assumes jurisdiction of the appeal, it shall indicate in its order whether the action in the trial court shall be stayed or shall continue.

The failure of a party to appeal from an order that is appealable under either subdivision 2 or 3 of subsection (b) of this section shall not preclude him from asserting error int he order after the judgment or final order is rendered.

R.L.1910, § 5236; Laws, 1955, p. 135, § 1; Laws 1968, c.290, § 1, eff. Jan. 13, 1969.

Okla. Stat. tit. 12, § 953 (1988). Final Order Defined

An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed, as provided in this article.

R.L.1910, c. 60, ar. 25, incorporated in this title.

Okla. Stat. tit. 12, § 993 (West Supp. 1995). Appeals from certain interlocutory orders

A. When an order:

1. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify an attachment;

2. Denies a temporary injunction, grants a temporary injunction except where granted at an ex parte hearing, or discharges, vacates, or modifies or refuses to discharge, vacate or modify a temporary injunction;

3. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify a provisional remedy which affects the substantial rights of a party;

4. Appoints a receiver except where the receiver was appointed at an ex parte hearing, refuses to appoint a receiver, or vacates or refuses to vacate the appointment of a receiver;

5. Directs the payment of money pendente lite except where granted at an ex parte hearing, refuses to direct the payment of money pendente lite, or vacates or refuses to vacate an order directing the payment of money pendente lite;

6. Certifies or refuses to certify an action to be maintained as a class action; or

7. Grants a new trial or opens or vacates a judgment or order, the party aggrieved thereby may appeal the order to the Supreme Court without awaiting the final determination in said cause, by filing the petition in error and the record on appeal with the Supreme Court within thirty (30) days after the order prepared in conformance with Section 10 of this act,[1] is filed with the court clerk. Where the order states the matter was taken under

advisement, the petition in error, if filed, must be filed within thirty (30) days from the date of mailing of a file-stamped copy of the order to the appealing party, as indicated on the Certificate of Mailing. The Supreme Court may extend the time for filing the record upon good cause shown.

B. If the order discharges or modifies an attachment or temporary injunction and it becomes operative, the undertaking given upon the allowance of an attachment or temporary injunction shall stay the enforcement of said order and remain in full force until final order of discharge shall take effect.

C. Where a receiver shall be or has been appointed, upon the appellant filing an appeal bond, with sufficient sureties, in such sum as may have been required of the receiver by the court or a judge thereof, conditioned for the due prosecution of the appeal and the payment of all costs or damages that may accrue to the state or any officer or person by reason thereof, the authority of the receiver shall be suspended until the final determination of the appeal, and if the receiver has taken possession of any property, real or personal, it shall be returned and surrendered to the

appellant upon the filing and approval of the bonds.

Laws 1970, c. 289, § 1, eff. July 1, 1970; Laws 1978, c. 245, § 8, eff. July 1, 1978; Laws 1984, c. 40, § 1, eff. Nov. 1, 1984; Laws 1990, c. 251, § 14, eff. Jan. 1, 1991; Laws 1991, c. 251, § 17, eff. June 1, 1991; Laws 1993, c. 351, § 22, eff. Oct. 1, 1993.

[1] Section 696.3 of this title.

Okla. Stat. tit. 12, § 1451 (1993). By and to whom writ issued--Function

The writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term, or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, it cannot control judicial discretion.

R.L.1910, § 4907.

Okla. Stat. tit. 12, § 1452 (1993). Writ not issued where remedy at law--Information.

This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. It may be issued on the information of the party beneficially interested.

R.L.1910, § 4908.

Okla. Const. art. 7, § 4. Jurisdiction of Supreme Court--Writs

The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies,

Commissions and Boards created by law. The Supreme Court Court of Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute. Each of the Justices or Judges shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody and make such writs returnable before himself, or before the Supreme Court, other Appellate Courts, or before any District Court, or judge thereof in the State. The appellate and the original jurisdiction of the Supreme Court and all other appellate courts shall be invoked in the manner provided by law.

Added by State Question No. 448, Legislative Referendum No. 164, adopted at election held July 11, 1967.

Okla. Const. art. 7, § 7. District Courts--Jurisdiction--Courts abolished--Transfer of jurisdiction, files, etc.

(a) The State shall be divided by the Legislature into judicial districts, each consisting of an entire county or of contiguous counties. There shall be one District Court for each judicial district, which shall have such number of District Judges, Associate District Judges and Special Judges as may be prescribed by statute. The District Court shall have unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article, and such powers of review of administrative action as may be provided by statute. Existing electing districts for all who are or who become District Judges and Associate District Judges under the terms of this Article shall remain as they are constituted for the offices formerly held by such persons on the effective date of this Article, until changed by statute. The Legislature may at any time delegate authority to the Supreme Court to designate by court rule the division of the State into districts and the number of judges.

Okla. Stat. tit. 15, § 802 (1993). Application of act--Courts--Jurisdiction

A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

B. The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

Laws 1978, c. 308, § 2, eff. Oct. 1, 1978.

IN THE SUPREME COURT OF THE STATE
OF OKLAHOMA

FARMERS INSURANCE COMPANY, INC.,	)	
Appellant,	)	
vs.	)	No. 84516
JOSEPH JABBOUR,	)	
Appellee.	)	

PETITION IN ERROR
(AND PRELIMINARY STATEMENT)
(INTERLOCUTORY ORDER)

. . .

E. ALL APPELLANTS MUST SHOW HOW THE APPEAL IS TIMELY BROUGHT

. . .

3. 9 U.S.C. § 16(a)(D) provides that appeals may be immediately brought from orders denying confirmation of arbitration awards. Petition in Error was delivered to the Supreme Court Clerk within thirty days of date order was mailed to Appellant by District Court Clerk.

. . .

MAY 8 1995
CLERK

No. 94-1656

In The

Supreme Court of the United States

October Term, 1994

FARMERS INSURANCE COMPANY, INC.,

Petitioner,

vs.

JOSEPH JABBOUR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the dismissal of an appeal by the Oklahoma Supreme Court a final order which gives this Court jurisdiction to hear this matter when the appeal was not dismissed on the merits but was dismissed as premature and a federal issue has not been finally decided and later state appellate review could be had of the federal issue?

2. Does the Oklahoma Uniform Arbitration Act combined with the McCarran-Ferguson Act operate to exempt the application of the Federal Arbitration Act to insurance contracts in Oklahoma when the Oklahoma Uniform Arbitration Act specifically excludes arbitration clauses in insurance contracts from enforceability?

3. Does the Supremacy Clause require that a state appellate court accept the appeal of a state trial court's interlocutory order which is not appealable when the appealing party has failed to properly invoke the original jurisdiction of the state appellate court which is available to the appellant?

4. Is an appraisal clause in an automobile insurance contract the same as an arbitration clause when Oklahoma common law restricts appraisals to determining the amount in controversy and provides that denial of liability waives the right to invoke the appraisal clause and the Oklahoma Constitution prohibits its enforceability?

LIST OF PARTIES

Petitioner:

Farmers Insurance Company, Inc.

Respondent:

Joseph Jabbour

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No. 94-1656

In The

Supreme Court of the United States

October Term, 1994

FARMERS INSURANCE COMPANY, INC.,

Petitioner,

vs.

JOSEPH JABBOUR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The Respondent disagrees that 28 U.S.C. § 1257(a) (1993) confers jurisdiction to this Court to decide the matters proffered by Petitioner. Title 28 U.S.C. § 1257(a) (1993) only confers jurisdiction when there has been a final judgment or decree "rendered by the highest court of a state in which a decision could be had." In the case at bar the Order of the Oklahoma Supreme Court about which Petitioner complains is not a final order nor does it finally decide any federal issue. The substantive portion of the order in its entirety is:

> Appellee's motion to dismiss is granted and this appeal is dismissed. The trial court's order, refusing to confirm an appraisal award in a case arising out of an insurance contract, is not an interlocutory prejudgment order appealable by right. Insurance contracts are specifically excluded from the Oklahoma Arbitration Act. See 15 O.S. 1991 § 802A(A). Interlocutory orders appealable by right are limited to those expressly identified by an Oklahoma statute. *Reams v. Tulsa Cable Television, Inc.*, 604 P.2d 373 (Okl. 1979).
>
> Appellant's request that the original petition in error be recast as an application to assume original jurisdiction and petition for writ of mandamus is denied.
>
> DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10TH DAY OF JANUARY, 1995.

The Oklahoma Supreme Court only decided that the trial court's interlocutory order was not appealable and that petitioner had prematurely appealed. The Oklahoma Supreme Court noted that the Oklahoma Arbitration Act specifically excludes insurance contracts from its requirements. Nothing was mentioned concerning a federal issue. No federal issue was finally decided by the Oklahoma Supreme Court.

The United States Supreme Court does not have jurisdiction to review interlocutory judgments unless a federal claim has been finally decided *and* later review of the federal issue could not be had regardless of the outcome of the case. *Pennsylvania v. Ritchie, Pa.*, 107 S. Ct. 989, 480 U.S. 39, 94 L. Ed. 2d 40 (1987).

Petitioner admits that the trial court's order was an interlocutory order. (Pet. for Cert. 8). Petitioner also admits it will be afforded state court appellate review of the federal issue. (Pet. for Cert. 12). Consequently, Petitioner has freely admitted that this matter does not qualify for the exception to this Court's lack of jurisdiction to review an interlocutory state court order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioner and included in Petitioner's appendix to its Petition for Certiorari, Respondent relies on the following:

Okla. Stat. Ann. tit. 15 § 802(A) (West 1993) which states:

> A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

Okla. Stat. Ann. tit. 36, § 1250.8 (West Supp. 1995) (App., *infra*, 1a-4a).

Okla. Const. art. 2, § 19 which provides in pertinent part:

> The right of trial by jury shall be and remain inviolate. . . .

Okla. Const. art. 23, § 8 which provides in pertinent part:

> Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.

STATEMENT OF THE CASE

In June of 1989, Respondent, Joseph Jabbour, purchased an insurance policy from the Petitioner which provided comprehensive and collision coverage for his 1984 Porsche. That policy of insurance contained the following language:

> You or we may demand appraisal of the **loss.** Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court having jurisdiction, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of **loss.** An award in writing by any two appraisers will determine the amount payable, which shall be binding subject to the terms of the insurance.

(Emphasis supplied).

In July, 1989, Mr. Jabbour suffered a loss to his 1984 Porsche, including collision damages and theft damages. These losses were covered under the comprehensive and collision coverage of the policy issued to Mr. Jabbour by Petitioner.

Mr. Jabbour made a claim under the policy for his damages. Petitioner denied liability for a large portion of the theft damages.

Mr. Jabbour could not resolve the amount of the claim with Petitioner, so on September 7, 1989, he filed a lawsuit in the District Court of Tulsa County, Oklahoma seeking $15,000 for the collision damage and $10,390.75 for theft damages.

Respondent entered its appearance, offered to confess judgment in the amount of $15,275 and answered Mr. Jabbour's petition by denying liability for the majority of the theft loss, denying Mr. Jabbour's allegations of the amount of damages and requesting appraisal pursuant to a provision in the comprehensive and collision portion of Mr. Jabbour's insurance policy.

Mr. Jabbour amended his petition in February, 1991 to state a cause of action for bad faith against Petitioner. Petitioner removed the action to the United States District Court, Northern District, Oklahoma, which thereafter remanded the case to state court on June 12, 1991.

In June, 1992 Petitioner filed a motion to stay and to require an appraisal of Mr. Jabbour's loss. On August 19, 1992, the Tulsa District Court granted Petitioner's motion without comment. On January 22, 1993 the Tulsa County District Court ordered Mr. Jabbour to name an appraiser. On January 10, 1994, the appraisers and an umpire selected by the appraisers valued Mr. Jabbour's loss at $18,500 minus a $500 deductible for a total of $18,000.

Representatives for both Petitioner and Mr. Jabbour signed a memorandum memorializing the appraisal and specifically reserving to each all rights under the policy. Petitioner then paid Mr. Jabbour $18,000 without condition and moved the Tulsa County District Court for an order confirming the appraisal "award."

Mr. Jabbour then filed his second amended petition seeking contractual damages over and above the $18,000 paid by Petitioner and damages for bad faith.

The Tulsa County District Court denied Petitioner's motion to confirm the appraisal "award" and Petitioner attempted to appeal this interlocutory order to the Oklahoma Supreme Court. The Oklahoma Supreme Court dismissed the appeal because the Tulsa County District Court's denial of Petitioner's motion to confirm the appraisal "award" was an interlocutory order not appealable as of right under Oklahoma law.

Petitioner has now petitioned this Court for Certiorari contending that the Oklahoma Supreme Court's dismissal of Petitioner's untimely appeal was a final order reviewable by this Court.

Mr. Jabbour asserts, as Petitioner admits, that the Oklahoma Supreme Court's order dismissing Petitioner's untimely appeal is not a final order, nor does it preclude state appellate review of Petitioner's alleged federal issue.

REASONS FOR DENYING THE WRIT

Assuming, *arguendo,* that this Court has jurisdiction, Petitioner has asserted no sound reason for this Court to grant certiorari.

Petitioner cites *Miller v. Nat. Fid. Life Ins. Co.*, 588 F.2d 185 (1979) and *Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971) for the proposition that the McCarran-Ferguson Act, 15 U.S.C. §§ 1012 *et seq.*, does not apply in this case. However, both of the cited cases actually stand for the proposition that the McCarran-Ferguson Act will prohibit imposition of federal law where state law regulating insurance will be invalidated, impaired, or

superseded. In those particular cases, no specific statutes were shown to be invalidated by application of federal law.

Recently, the Tenth Circuit has addressed a strikingly similar situation as the one presented to this Court in the case at bar. In *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931 (10th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 604, 121 L. Ed. 2d 540 (1992), the Tenth Circuit was faced with a Kansas arbitration statute which specifically excluded insurance contracts from arbitration. Just as Petitioner argues in the case at bar, it was argued that the Kansas arbitration statute did not regulate insurance. It was argued that because the arbitration statute was not a part of the Kansas insurance code that it did not directly or indirectly regulate insurance. The cases relied upon for this argument were the same which Petitioner relies upon in the case at bar. However, the Tenth Circuit disagreed and specifically stated:

> The statutes at issue in Hart and Hamilton differ from K.S.A. § 5-401 in one very important respect in that those statutes governed arbitration in general and did not mention "contracts of insurance." The trial court noted as to Hart that the statute there considered did not contain the exception "contracts of insurance," but apparently concluded that made no difference. Section 5-401 as it now exists expressly excludes contracts of insurance from arbitration and therefore it is not comparable to the statutes in Hart and Hamilton.

Mutual Reinsurance Bureau v. Great Plains Mt. Ins. Co., Inc., 969 F.2d at 934.

The Tenth Circuit went on to find that because the Kansas arbitration statute expressly excluded contracts of insurance, that it directly regulated the terms of insurance contracts and would be exempt from the Federal Arbitration Act because of the McCarran-Ferguson Act.

> For the application of the McCarran-Ferguson Act it is not necessary, as the Appellee urges, that the state statute "regulate the business of insurance" be in the form of an insurance code or an act relating only to insurance. The application of the Kansas statute here concerned to insurance as an exception is clear and direct although included in an act relating basically to arbitration.
>
> It is apparent that the Federal Arbitration Act is significant legislation to provide for the enforcement of arbitration agreements and to express an important policy favoring arbitration. See Dean Witter Reynolds v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). However, in our view the Kansas statute combined with the McCarran-Ferguson Act prevents its application.

Mutual Reinsurance Bureau at 934-935.

Just as in the Kansas arbitration statute, insurance contracts are specifically excluded from the Oklahoma Uniform Arbitration Act:

> A. This act shall apply to a written agreement to submit any existing controversy to

> arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. *This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.*

(Emphasis added). Okla. Stat Ann. tit. 15 § 802(A) (West 1993).

Imposition of federal law will cause the specific legislative intent to exclude arbitration clauses in insurance contracts from enforceability to be superseded. This violates the McCarran-Ferguson Act.

In an even more recent case, the Third Circuit was concerned with the application of the Federal Trade Commission Act to alleged price-fixing in title search fees for title insurance companies. The Third Circuit explained *Mutual Reinsurance Bureau:*

> The challenged statute in Mutual Reinsurance, however, as in Gahn, directly regulated a term of the insurance contract, unlike the regulatory schemes at issue here. Although arbitration clauses are not unique to insurance contracts, Ticor fails to recognize that the state statute in question in Mutual Reinsurance did not generally prohibit arbitration clauses. Rather, the statute at issue made such clauses unenforceable only when contained in insurance contracts.

Ticor Title Ins. Co. v. Federal Trade Comm., 998 F.2d 1129, 1135 (3rd Cir. 1993).

Clearly, state arbitration statutes which specifically exclude insurance contracts are statutes directly regulating the terms of insurance contracts. Therefore, such statutes regulate the business of insurance and because of the exemption created by the McCarran-Ferguson Act, the Federal Arbitration Act would not preempt the state statute.

It is equally clear that should the contrary be allowed, insurers like Petitioner would be able to make all matters of dispute in insurance policies subject to arbitration. Oklahoma's statutes regulating claims procedures would effectively be repealed. For example, in the case at bar, the claim made by Mr. Jabbour is a claim for the total loss of a motor vehicle. Under the terms of the *appraisal* clause in the policy, Petitioner can at any time invoke the appraisal method for resolving the dispute.

However, Oklahoma has long had a statute which expressly governs the claims process of an insurer in case of total loss of a motor vehicle. Okla. Stat. Ann. tit. 36, § 1250.8 (West Supp. 1995) (previously, Okla. Stat. Ann. tit. 36, § 1257). Should Petitioner be able to use the Federal Arbitration Act to supersede the Oklahoma Uniform Arbitration Act, the requirements of Section 1257 are invalidated, impaired and superseded. This violates the McCarran-Ferguson Act. *See also,* Unfair Claims Settlement Practices Act, Okla. Stat. Ann. tit. 36, §§ 1250.1 *et seq.* (West Supp. 1995).

I.

SUPREMACY CLAUSE

Oklahoma law does not allow the appeal as of right of the

interlocutory trial court order in the case at bar. Oklahoma does allow for review of certain interlocutory orders affecting substantial rights by original action in the Oklahoma Supreme Court. However, the Supremacy Clause to the United States Constitution does not create appellate jurisdiction in a state appellate court where none otherwise existed. *Mclin v. Trimble,* 795 P.2d 1035, 1040 (Okla. 1990).

Petitioner never used the proper method to obtain original jurisdiction in the Oklahoma Supreme Court. Instead, Petitioner attempted to appeal an unappealable interlocutory order. This is why the Oklahoma Supreme Court dismissed Petitioner's appeal. (page 2, *supra*).

II.

APPRAISAL CLAUSE IS NOT ARBITRATION

The provision in the insurance contract at issue is not an arbitration clause at all. It is an *appraisal* clause. That there is a difference between an appraisal clause and an arbitration clause is borne out by the insurance contract itself. Under the uninsured motorist portion of the policy there is a clearly worded arbitration clause. It is titled "Arbitration." (Arbitration, App., *infra,* 5a-6a).

The *arbitration* clause in the uninsured motorist section of the policy is demonstrably different from the *appraisal* clause in the comprehensive and collision section of the policy. (*See* page 4, *supra*). Had the Petitioner intended that appraisal be the equivalent of arbitration, these sections would not have different titles and substance. It is clear Petitioner intended there to be a difference between appraisal and arbitration.

Furthermore, Oklahoma common law clearly establishes that appraisal provisions only apply to determining the value of a claim and that when an insurer denies liability, it waives whatever

right it has to appraisal under the contract. *Massey v. Farmers Ins. Group*, 837 P.2d 880, 882 (Okla. 1992). Petitioner in this case has denied liability for the majority of the theft loss claim for stereo equipment. In paragraph No. 6 of Petitioner's Answer to Mr. Jabbour's Petition it was alleged:

> 6. That Plaintiff's custom stereo system installed in the vehicle was only covered under the insurance policy in question to the extent that it was installed in the normal factory openings for sound reproducing equipment. That the majority of plaintiff's custom stereo system was not so installed; therefore, those components of said system are excluded from coverage under the terms of the policy in question.

Therefore, pursuant to Oklahoma common law, upon which Petitioner is relying, Petitioner waived its right to appraisal by denying liability for a major portion of the claim.

III.

OKLAHOMA CONSTITUTION

The Constitution of the State of Oklahoma expressly prohibits the enforceability of contracts purporting to restrict constitutional rights. Okla. Const. art, 23, § 8 which provides in pertinent part:

> Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.

As such, the appraisal provision in this matter violates

Article 23, § 8 by restricting Mr. Jabbour's right to a trial by jury which is embodied in Okla. Const. art. 2, § 19 which provides in pertinent part:

> The right of trial by jury shall be and remain inviolate. . . .

CONCLUSION

Petitioner has failed to demonstrate to this Court that it has jurisdiction when there has been no final order of Oklahoma's highest court and when federal rights have not been decided by the Oklahoma Supreme Court and Petitioner has access to Oklahoma appellate courts regarding its purported federal issue. Assuming, *arguendo,* that this Court has jurisdiction, Oklahoma's Uniform Arbitration Act explicitly excludes arbitration clauses in insurance contracts from enforceability. This statute combined with the McCarran-Ferguson Act, exempts insurance contracts from application of the Federal Arbitration Act. Petitioner has waived its right to appraisal under Oklahoma common law by denying liability for a major portion of the claim. The subject appraisal provision violates the Oklahoma Constitution. For all these reasons the Petition for Certiorari must be denied.

Respectfully submitted,

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APPENDIX A — OKLAHOMA STAT. ANN. TIT. 36, § 1250.8 (WEST SUPP. 1995)

§ 1250.8 Motor vehicle total loss or damage claim

A. If an insurance policy or insurance contract provides for the adjustment and settlement of first party motor vehicle total losses, on the basis of actual cash value or replacement with another of like kind and quality, one of the following methods shall apply;

1. An insurer may elect to offer a replacement motor vehicle which is a specific comparable motor vehicle available to the insured, with all applicable taxes, license fees, and other fees incident to the transfer of evidence of ownership of the motor vehicle paid, at no cost to the insured other than any deductible provided in the policy. The offer and any rejection thereof shall be documented in the claim file; or

2. An insured may elect a cash settlement based upon the actual cost, less any deductible provided in the policy, to purchase a comparable motor vehicle, including all applicable taxes, license fees and other fees incident to a transfer of evidence of ownership, or a comparable motor vehicle. Such cost may be determined by:

a. the cost of a comparable motor vehicle in the local market area when a comparable motor vehicle is available in the local market area,

b. one of two or more quotations obtained by an insurer from two or more qualified dealers located within the local market area when a

comparable motor vehicle is not available in the local market area, or

c. the cost of a comparable motor vehicle as quoted in the latest edition of the National Automobile Dealers Association Official Used Car Guide.

B. If a first party motor vehicle total loss is settled on a basis which deviates from the methods described in subsection A of this section, the deviation shall be supported by documentation giving particulars of the condition of the motor vehicle. Any deductions from such cost, including, but not limited to, deduction for salvage, shall be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount. The basis for such settlement shall be fully explained to a first party claimant.

C. If liability for motor vehicle damages is reasonably clear, insurers shall not recommend that third party claimants make claims pursuant to the third party claimants' own policies solely to avoid paying claims pursuant to such insurer's insurance policy or insurance contract.

D. Insurers shall not require a claimant to travel unreasonably either to inspect a replacement motor vehicle, obtain a repair estimate or have the motor vehicle repaired at a specific repair shop.

E. Insurers shall, upon the request of a claimant, include the deductible of a first party claimant, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with a first party claimant, unless the

deductible amount has been otherwise recovered. No deduction for expenses shall be made from a deductible recovery unless an outside attorney is retained to collect such recovery. The deduction shall then be made for only a pro rata share of the allocated loss adjustment expense.

F. If an insurer prepares an estimate of the cost of automobile repairs, such estimate shall be in an amount for which it reasonably may be expected that the damage can be repaired satisfactorily. An insurer shall give a copy of an estimate to a claimant and may furnish to the claimant the names of one or more conveniently located repair shops, if requested by the claimant.

G. If an amount claimed is reduced because of betterment or depreciation, all information for such reduction shall be contained in the claim file. Such deductions shall be itemized and specified as to dollar amount and shall be appropriate for the amount of deductions.

H. An insurer or its representative shall not require a claimant to obtain motor vehicle repairs at a specific repair facility. An insurer or its representative shall not require a claimant to obtain motor vehicle glass repair or replacement at a specific motor vehicle glass repair or replacement facility. An insurer shall fully and promptly pay for the cost of the motor vehicle repair services or products, less any applicable deductible amount payable according to the terms of the policy. The claimant shall be furnished an itemized priced statement of repairs by the repair facility at the time of acceptance of the repaired motor vehicle. Unless a cash settlement is made, if a claimant selects a motor vehicle repair or motor vehicle glass repair or replacement facility, the insurer shall provide payment

to the facility based on a competitive price, as established by that insurer through market surveys or by the insured through competitive bids at the insured's option, to determine a fair and reasonable market price for similar services. Reasonable deviation from this market price is allowed based on the facts in each case.

I. An insurer shall not use as a basis for cash settlement with a first party claimant an amount which is less than the amount which an insurer would pay if repairs were made, other than in total loss situations, unless such amount is agreed to by the insured.

J. An insurer shall not force a claimant to execute a full settlement release in order to settle a property damage claim involving a personal injury.

K. All payment or satisfaction of a claim for a motor vehicle which has been transferred by title to the insurer shall be paid by check or draft, payable on demand.

L. As used in this section, "total loss" means that the vehicle repair costs plus the salvage value of the vehicle meets or exceeds the actual cash value of the motor vehicle prior to the loss, as provided in used automobile dealer guidebooks.

Laws 1986, c. 251, § 19 eff. Nov. 1, 1986. Amended by Laws 1987, c. 175, § 12, eff. Nov. 1, 1987; Laws 1993, c. 225, § 1, eff. Sept. 1, 1993. Renumbered from § 1257 of this title and amended by Laws 1994, c. 342, §§ 8, 20, eff. Sept. 1, 1994.

APPENDIX B — EXCERPT FROM "PART II - UNINSURED MOTORIST" OF FARMERS INSURANCE COMPANY'S POLICY OF INSURANCE ISSUED TO JOSEPH JABBOUR, TITLED "ARBITRATION"

* * *

Arbitration

If an **insured person** and we do not agree (1) that the person is legally entitled to recover **damages** from the owner or operator of an **uninsured motor vehicle,** or (2) as to the amount of payment under this part, either that person or we may demand that the issue be determined by arbitration.

In that event, an arbitrator will be selected by the **insured person** and us. If agreement on an arbitration cannot be reached within (30) days, the judge of a court having jurisdiction will appoint the arbitrator. The expense of the arbitrator and all other expenses of arbitration will be shared equally. Attorney's fees and fees paid for the witnesses are not expenses of arbitration and will be paid by the party incurring them.

The arbitrator shall determine (1) the existence of the operator of an **uninsured motor vehicle,** (2) that the **insured person** is legally entitled to recover **damages** from the owner or operator of an **uninsured motor vehicle,** and (3) the amount of payment under this part as determined by this policy or any other applicable policy.

Arbitration will take place in the county where the **insured person** lives. Local court rules governing procedures and evidence will apply. The decision in writing of the arbitrator will be binding subject to the terms of this insurance.

Appendix B

If agreement by arbitration is not reached within three months from the date of demand, you may bring action against anyone responsible for use of the vehicle involved in the **accident.**

(emphasis supplied)

Supreme Court, U.S.
FILED
MAY 23 1995
CLERK

No. 94-1656

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On Petition For Writ of Certiorari
To the Supreme Court of the State of Oklahoma

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

All parties in the underlying state court action appear in the caption of this case. Farmers Insurance Company, Inc. has no no subsidiaries. Farmers Insurance Company, Inc. is owned by Farmers Insurance Exchange.

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Respondent.

On Petition For Writ of Certiorari
To the Supreme Court of the State of Oklahoma

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Sup. Ct. R. 15.6, petitioner, Farmers Insurance Company, Inc., ("Farmers") submits this Reply To Respondent's Brief in Opposition.

I. Brief Statement Of Case

Respondent Joseph Jabbour ("Jabbour") asserts that this Court lacks jurisdiction. Jabbour contends that the Oklahoma Supreme Court never decided a federal claim. Jabbour also

concludes that the Oklahoma Supreme Court order of January 10, 1995, is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a)(1993).

However, and as more fully discussed below, the Oklahoma Supreme Court in fact determined a federal question. Indeed, the Oklahoma Supreme Court expressly required Farmers to file a brief addressing whether the Federal Arbitration Act ("FAA") provides a basis for appeal. (Pet. For Cert., Appendix, pg. 10).

As to finality, Jabbour confuses the precise order that Farmers asks this Court to review. Farmers is not asking for review of the trial court's order refusing to confirm the arbitration award. (Pet. For Cert., Appendix, pg. 6-9). Rather, Farmers is seeking review of the Oklahoma Supreme Court's order dismissing Farmers' appeal and refusing to accept the matter within its original jurisdiction. (Pet For Cert., Appendix, pg. 11-12). The Oklahoma Supreme Court's order is "final" even though further state court proceedings are anticipated.

II. Argument And Authority

A. THE OKLAHOMA SUPREME COURT DETERMINED THAT THE FAA APPEAL RULES ARE INAPPLICABLE IN STATE COURTS

The Oklahoma Supreme Court in fact determined a federal claim or issue. The federal issue presented to the Court was whether 9 U.S.C. § 16 (West Supp. 1995) requires state courts to review various anti-arbitration orders.

Farmers specifically raised this federal issue in its Petition In Error filed with the Oklahoma Supreme Court. (Pet. For Cert, appendix, pg. 30). The Oklahoma Supreme Court subsequently ordered Farmers to show cause why the appeal should not be dismissed. (Pet. For Cert., appendix, pg. 10). The Court specifically asked Farmers to brief the following issues: "1) why the Federal Arbitration Act should apply when the Oklahoma Arbitration Act expressly exempts insurance contracts from its provisions...2) whether the Federal Arbitration Act applies in this case...and 3) if the Oklahoma and Federal Arbitration Acts don't apply, any other reason why the trial court's order would be appealable." (Pet. For Cert., appendix, pg. 10).

Farmers filed a brief expressly addressing the federal issue of whether 9 U.S.C. § 16 is applicable in state court. In its brief, Farmers cited 9 U.S.C. § 16 as the sole basis for the appeal and request to assume original jurisdiction. On January 10, 1995, the Oklahoma Supreme Court dismissed the appeal and refused to assume original jurisdiction. (Pet. For Cert., appendix, pg. 11-12).

The Oklahoma Supreme Court simply could not have entered the above order without deciding whether the FAA appeal rules are applicable in state court. See, Powell v. Supervisors Of Brunswick Co., 150 U.S. 433, 440 (1893)("If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that will be sufficient...")

The record in the present case clearly shows the Oklahoma Supreme Court determined a federal issue.

B. THE OKLAHOMA SUPREME COURT'S ORDER IS "FINAL" SINCE LATER REVIEW OF THE ORDER CANNOT BE HAD, REGARDLESS OF THE OUTCOME OF THE CASE

The Oklahoma Supreme Court's order denying review of the trial court's refusal to confirm the arbitration award is "final." The order clearly falls within the one of the categories of cases in which U.S. Supreme Court jurisdiction is proper although further state proceedings are anticipated. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481 (1975). The applicable category is as follows:

> In the third category of cases are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him to again present his federal claims for review.

Id.

Here, Farmers' federal claim is that 9 U.S.C. § 16, which provides for immediate appeal of various interlocutory orders, is

applicable in state courts. The Oklahoma Supreme Court rejected Farmers' federal claim. If this case goes to trial, Farmers' federal claim will be moot. Farmers will never again be able to raise its federal claim, regardless of the ultimate outcome of the case. This Court has jurisdiction to review the Oklahoma Supreme Court's order. See, National Socialist Party Of America v. Village of Skokie, 432 U.S. 43 (1977)(Illinois Supreme Court's order refusing to stay trial court's injunction pending appellate review was a final judgment for purposes of jurisdiction).

III. Conclusion

The highest court of Oklahoma, the Oklahoma Supreme Court, decided a federal claim. Further review of the federal claim cannot be had, regardless of the outcome of the case. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a)(1993).

Respectfully submitted,

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